INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	2
Summary of argument	3
Argument:	
I. A widow's allowance is a terminable interest under Section 812(e) if it is subject to any contingencies beyond the widow's election to claim the allowance. In this case the allowance is subject to the contingencies (1) of survival unremarried to the date of decree, and (2) of survival unremarried during the period for which each successive periodic payment is made	6
Introduction	6
A. Section 812(e) makes the date of death the relevant time for determining whether a widow's allowance is a terminable interest and, at that date, the widow's interest in this case was terminable	12
B. Even if the court decree were to be related back to the date of death, the allowance in this case would be a terminable interest	16
II. The widow's allowance in this case is not deductible because another interest in the same property has passed from the decedent to another person who may enjoy the property after the termination or failure of the allowance	18
Conclusion	19
Appendix	20

721-505—64——1

CITATIONS

Cases: Page

Ballentine v. *Tomlinson*, 293 F. 2d 311 13
Blair, Estate of, 42 Cal. 2d 728, 269 P. 2d 612 16
Bookwalter v. *Lamar*, 323 F. 2d 664 ..... 13, 15
Bookwalter v. *Phelps*, 325 F. 2d 186 8
Commissioner v. *Ellis' Estate*, 252 F. 2d 109 13
Croke, In re Estate of, 155 Ohio St. 434, 99 N.E. 2d 483 8
Cunha's Estate v. *Commissioner*, 279 F. 2d 292, certiorari denied, 364 U.S. 942 ..... 11, 14, 19
Darby's Estate v. *Wiseman*, 323 F. 2d 792 ..... 9, 11, 18
Dougherty v. *United States*, 292 F. 2d 331 15
First Nat. Bank & Trust Co. of Augusta v. *United States*, 191 F. Supp. 446, affirmed, 297 F. 2d 312 8
Gale, Estate of v. *Commissioner*, 35 T.C. 215 ..... 8, 12, 15
Hamilton, Estate of, 66 Cal. 576, 6 Pac. 493 16
Hearn's Estate, In re, 22 Del. Ch. 447, 195 Atl. 367 8
Landers, Estate of v. *Commissioner*, 38 T.C. 828 12
Lux's Estate, In re, 114 Cal. 73, 45 Pac. 1023 16
Meyer v. *United States*, 364 U.S. 410 19
Molner v. *United States*, 175 F. Supp. 271 8
Rensenhouse, Estate of v. *Commissioner*, 252 F. 2d 566 11
Rensenhouse, Estate of v. *Commissioner*, 31 T.C. 818 12
Reynolds' Estate v. *United States*, 189 F. Supp. 548 ..... 8, 12
Rudnick, Estate of v. *Commissioner*, 36 T.C. 1021 ..... 8, 12, 15
Sbicca, Estate of v. *Commissioner*, 35 T.C. 90 13
Second National Bank of New Haven v. *United States*, 222 F. Supp. 446 12
Starrett v. *Commissioner*, 223 F. 2d 163 13
United States v. *Crosby*, 257 F. 2d 515 15
United States v. *First National Bank & T. Co. of Augusta*, 297 F. 2d 312 ..... 11, 15, 18
United States v. *Hiles*, 318 F. 2d 56 16
United States v. *Mappes*, 318 F. 2d 508 ..... 13, 15
United States v. *Quirey*, 292 F. 2d 252 ..... 11, 13, 17
United States, v. *Stapf*, 375 U.S. 118 0
United States v. *Traders National Bank of Kansas City*, 248 F. 2d 667 15
United States Nat. Bank of Portland v. *United States*, 188 F. Supp. 332 ..... 8, 11

Statutes:

	Page
Internal Revenue Code of 1939 (26 U.S.C., 1952 ed.):	
Sec. 812(b)	9, 10
Sec. 812(e) in passim	3, 6, 7, 11, 13, 16, 18, 19, 21
Internal Revenue Code of 1954 (26 U.S.C., 1958 ed.):	
Sec. 2056 (a) and (b)	6
Revenue Act of 1948, 62 Stat. 110	6
Revenue Act of 1950, 64 Stat. 906, Sec. 502	10
California Probate Code, Secs. 680, 681, 682	3, 20
21 Conn. Gen. Stat. Ann., Sec. 45-250	8
Miscellaneous:	
1962-1 Cum. Bull. 4	14
H.R. 2573, 86th Cong., 1st Sess.	14
Rev. Rul. 83, 1953-1 Cum. Bull. 395	11, 13
Rev. Rul. 56-26, 1956-1 Cum. Bull. 447	14
S. Rep. No. 1013, 80th Cong., 2d Sess.	7, 8
S. Rep. No. 1013, Part 2, 80th Cong., 2d Sess.	9, 12, 18
S. Rep. No. 1622, 83d Cong., 2d Sess.	13, 14
S. Rep. No. 2375, 81st Cong., 2d Sess.	10, 14
Treasury Regulations 105:	
Sec. 81.47b(d)	22
Treasury Regulations on Estate Tax (1954 Code):	
Sec. 20.2056(b)-1	14, 24
Sec. 20.2056(e)-2	14, 14, 15, 16, 25
Sec. 20.2056(e)-3	25

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 361

L. R. JACKSON ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The district court's findings of fact and conclusions of law (R. 28–29) are not officially reported. The opinion of the court of appeals (R. 32–39) is reported at 317 F. 2d 821.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1963. (R. 39.) The petition for a writ of certiorari was filed on August 12, 1963, and was granted on October 28, 1963. (R. 40; 375 U.S. 894.) The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a widow's support and maintenance allowance, payable periodically by the deceased husband's estate pursuant to California law if the widow survives unremarried to the date of the award and to the date of each payment, is deductible from the decedent's gross estate as part of the marital deduction under Section 812(e)(1) of the Internal Revenue Code of 1939.

STATUTES AND REGULATIONS INVOLVED

The relevant portions of the California Probate Code, the Internal Revenue Code of 1939, Section 812(e), and the Treasury Regulations under the 1939 and 1954 Codes, are set forth in the Appendix, *infra*, pp. 21–25.

STATEMENT

The decedent, George A. Richards, died testate on May 27, 1951, while a resident of the State of California. He was survived by his widow, Frances S. Richards, and a daughter, Rosene Richards Moore. On June 19, 1951, the decedent's will was admitted to probate and the widow qualified as the executrix of the estate (R. 32). The decedent's will made certain specific bequests and left the residue in trust for the benefit primarily for the decedent's daughter and her issue (R. 32–33).

On June 30, 1952, the Superior Court of the State of California, in and for the County of Los Angeles, authorized and directed the executrix to pay to herself, individually and as the decedent's surviving spouse,

the sum of $3,000 a month from the corpus of the estate for her support and maintenance, pursuant to Section 680 of the Probate Code of California. The allowance was to be paid for the period beginning May 27, 1951, the date of decedent's death, and was to continue until further order of the court, but not exceeding a total period of twenty-four months (R. 33). As of June 30, 1952, the date on which the order was entered, the sum of $42,000 was due and payable to the widow for the period that had already elapsed since her husband's death. That amount and an additional sum of $30,000, or a total of $72,000, was in fact paid to the widow from the corpus of the estate for the full period covered by the court order (R. 33).

On the federal estate tax return filed for the estate, the $72,000 so paid the widow was deducted as part of the marital deduction provided for by Section 812(e) of the Internal Revenue Code of 1939. The Commissioner of Internal Revenue disallowed the deduction and determined a deficiency accordingly. The estate paid the deficiency and in due course brought this suit for refund (R. 33–34). The district court held that the widow's allowance was a "terminable interest" and, hence, was not deductible (R. 28–30). The court of appeals affirmed (R. 34–39).

SUMMARY OF ARGUMENT

1. Since 1948 the federal estate tax law has permitted a "marital deduction" for the value of an interest in property passing from the decedent to his surviving spouse. However, such an interest cannot be deducted if it is "terminable" (*i.e.*, if it "will ter-

minate or fail" upon the occurrence of some event or contingency) and if another interest in the same property has passed to another person who may possess the property after the termination or failure of the widow's interest.

The question in this case concerns the deductibility of sums paid under a state statute which provides for an award to the widow to cover her living expenses during the period of administration of the estate of her husband. It is the government's position that no deduction is allowable if, at the time of the decedent's death, there exists any substantial condition, either precedent or subsequent, to the surviving spouse's right to receive the support allowance. The legislative history makes clear that unless the surviving spouse has an absolute interest in the property passing from the decedent at the time of his death there can be no marital deduction. This has been the accepted rule as to all other property interests. There is no reason for departing from this standard where the interest sought to be deducted is a widow's allowance.

In our view, therefore, a widow's allowance qualifies for the marital deduction only where the state statute grants an absolute vested right to the widow or to her estate at the instant of her husband's death or where, as in the case of a widow's election to take against the will, the widow's right is contingent on nothing more than her own action in demanding the amount. Where local law requires that the widow survive and remain unmarried until a decree is entered, or that she survive and remain unmarried

during the entire period for which she claims an award of periodic payments, there is interposed a substantial contingency beyond her control which is inconsistent with the marital deduction provisions. In this case, the state law is clear that death or remarriage either before a decree is entered or before any periodic payment is due defeats the widow's right. The allowance therefore does not qualify for the marital deduction.

Even if it were permissible to relate the court's decree back to the date of death, the estate would still not be entitled to a marital deduction in this case. Under state law the widow's rights were contingent not merely on surviving to the date of the court's decree but also on surviving to the date of each of the monthly periodic payments she was awarded. That additional contingency, which could have defeated the widow's right to the allowance at any point during the two years of the award, cannot be eliminated by delay in the issuance of the court decree.

2. The "property" in which the widow's allowance is an interest is either the corpus of the decedent's estate or that part of the corpus which would be needed to pay the allowance if she survived unremarried for twenty-four months. Whichever definition of the "property" is adopted, another interest in it has passed to the decedent's daughter and her issue as residuary beneficiaries. Since the decedent's daughter would enjoy an augmented interest in the same property after the failure of some part of the allowance at any time during the administration of

the estate, no part of the allowance can be deducted under the terms of the terminable interest rule.

ARGUMENT

I

A WIDOW'S ALLOWANCE IS A TERMINABLE INTEREST UNDER SECTION 812(e) IF IT IS SUBJECT TO ANY CONTINGENCIES BEYOND THE WIDOW'S ELECTION TO CLAIM THE ALLOWANCE. IN THIS CASE THE ALLOWANCE IS SUBJECT TO THE CONTINGENCIES (1) OF SURVIVAL UNREMARRIED TO THE DATE OF DECREE, AND (2) OF SURVIVAL UNREMARRIED DURING THE PERIOD FOR WHICH EACH SUCCESSIVE PERIODIC PAYMENT IS MADE

INTRODUCTION

The sole issue in this case concerns the deductibility of a widow's allowance under the statutory provision for a marital deduction in computing the estate tax. The controlling statute is Section 812(e)(1)[1] which was added to the Internal Revenue Code of 1939 by the Revenue Act of 1948 (Appendix, *infra*, pp. 21–22). Section 812(e)(1)(A) provides that a marital deduction is allowable in an amount equal to the value of any interest in property which passes or has passed from the decedent to the surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate. Section 812(e)(1)(H) provides that the aggregate amount of the marital deduction cannot exceed 50 percent of the decedent's adjusted gross estate. These provisions

[1] The provision in pertinent part appears unchanged in the Internal Revenue Code of 1954 as Section 2056(a) and (b)(1) (26 U.S.C., 1958 ed., Sec. 2056(a) and (b)).

were designed to give estates located in common-law states approximately the same advantage in computing estate tax liability as that enjoyed by estates located in community-property States, where only one-half of the community property is included in the decedent's taxable estate. *United States* v. *Stapf*, 375 U.S. 118, 128, rehearing denied, January 6, 1964; S. Rep. No. 1013, 80th Cong., 2d Sess., p. 5.

However, the right to the marital deduction is not absolute lest the advantage—which Congress sought to equalize between the states—be on the side of the estate in the common-law state. In the community-property state each spouse has a complete interest in one-half of the community property, and, while the wife's one-half will not be taxed in her husband's estate, it is subject to estate taxes at her death unless she has consumed or transferred it by that time. *United States* v. *Stapf, supra.* To assure that property accorded a marital deduction will also be taxed in the survivor's estate, Section 812(e)(1)(B) provides that no deduction shall be allowed where an interest in property passing to the surviving spouse may terminate or fail upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur, and where another interest in the property has passed from the decedent to some other person who may possess or enjoy the property after the termination or failure of the spouse's interest. This so-called "terminable-interest" rule was necessary to "equate the decedent in the common-law State with the decedent in the community-property State who cannot by his will affect in any way the sur-

viving spouse's interest in the community property", and its intended effect was to limit the deduction to cases where the decedent passes to the spouse "all of his interest in the property." S. Rep. No. 1013, 80th Cong., 2d Sess., p. 28.

A widow's allowance is solely a product of local law. Some state statutes provide for an award of the allowance in a lump sum; others, like the California statute here involved, provide for support payments over a prescribed period of time. The amount of the award may also be prescribed, or it may be left to the discretion of the probate court. More importantly, however, some state statutes provide that the right to the award vests immediately in the widow upon her husband's death, and, hence, may be claimed by her estate should she die before securing a probate court decree;[2] others condition the award upon the widow's survival without remarriage to the date of a probate court decree;[3] and still others, as here, condition the

[2] The Connecticut statute specifically provides for an immediate vesting of a support allowance (21 Conn. Gen. Stat. Ann., Sec. 45–250), and the laws of Delaware (*In re Hearn's Estate*, 22 Del. Ch. 447, 195 Atl. 367), of Missouri (*Bookwalter* v. *Phelps*, 325 F. 2d 186 (C.A. 8th), of Michigan (*Reynolds' Estate* v. *United States*, 189 F. Supp. 548 (E.D. Mich.)), of Illinois (*Molner* v. *United States*, 175 F. Supp. 271 (N.D. Ill.)), and of Ohio (*In re Estate of Croke*, 155 Ohio St. 434, 99 N.E. 2d 483) have been similarly construed.

[3] As in Georgia (*First Nat. Bank & Trust Co. of Augusta* v. *United States*, 191 F. Supp. 446 (S.D. Ga.), affirmed, 297 F. 2d 312 (C.A. 5th)), in Oregon (*United States Nat. Bank of Portland* v. *United States*, 188 F. Supp. 332 (D. Ore.), in Massachusetts (*Estate of Rudnick* v. *Commissioner*, 36 T.C. 1021), and in Maine (*Estate of Gale* v. *Commissioner*, 35 T.C. 215),

award upon the widow's survival, unremarried, to the date of each periodic payment.[4]

Prior to 1948 the allowance paid to a widow under local law for her support and maintenance pending the administration of her husband's estate was deductible as a cost of estate administration under Section 812(b)(5) of the Internal Revenue Code of 1939 to the extent "reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent". The deduction remained undisturbed when the provision for a marital deduction was enacted in 1948. Indeed, the Senate Report accompanying the Revenue Act of 1948 contained the following reference to widows' allowances (S. Rep. No. 1013, 80th Cong., 2d Sess., Pt. 2, p. 3):

> An interest in property does not pass to the surviving spouse from the decedent within the definition in section 812(e)(3) by reason of a claim against the estate, or any indebtedness, in favor of the surviving spouse for which a deduction is allowed by section 812(b). Neither the payments made in satisfaction of such a claim or debt nor the amounts expended in accordance with the local law for support of such surviving spouse during the settlement of the estate pass to such surviving spouse from the decedent within the meaning of section 812(e)(3).

[4] When a change in status occurs after the award in such a case, the right to the allowance abates. *Darby's Estate* v. *Wiseman*, 323 F. 2d 792, 795–796 (C.A. 10th).

In 1950, however, Section 812(b)(5) was repealed by Section 502 of the Revenue Act of 1950, 64 Stat. 906. The committee report stated (S. Rep. No. 2375, 81st Cong., 2d Sess., p. 130):

> This section of the bill, which is identical with section 502 of the bill as passed by the House, amends section 812(b) of the code (relating to deductions from gross estate of a decedent) to eliminate, effective with respect to estates of decedents dying after the date of enactment of the bill, the deduction for amounts expended for the support, during the settlement of the estate, of dependents of the decedent.
>
> Under existing law amounts expended in accordance with the local law for support of the surviving spouse of the decedent are, by reason of their deductibility under section 812(b), not allowable as a marital deduction under section 812(e) of the code. However, as a result of the amendment made by this section, such amounts heretofore deductible under section 812(b) will be allowable as a marital deduction *subject to the conditions and limitations of section 812(e)*.[8] [Emphasis supplied.]

Thus, while Congress at first treated the widow's allowance as a claim against the estate rather than an interest in property "passing" from the decedent, the allowance was later viewed as an interest passing

[8] Congress found it necessary to repeal the specific deduction for the widow's allowance because it felt that the deduction was inconsistent with the concept of the estate tax as a tax on properties transferred at death; that in practice it discriminated in favor of estates located in states having liberal allowances; and that it probably also tended to delay the settlement of estates. See S. Rep. No. 2375, *supra*, pp. 57–58.

by descent which could be deducted, if at all, only if it met the statutory prerequisities for a marital deduction. In view of the changed statutory treatment, it is of course settled that a widow's allowance satisfies the "passing" requirement specified in Section 812(e)(1)(A). *Estate of Rensenhouse* v. *Commissioner*, 252 F. 2d 566 (C.A. 6); see also, Rev. Rul. 83, 1953–1 Cum. Bull. 395; Treasury Regulations on Estate Tax (1954 Code), Section 20.2056(e)–2(a). It is on the application of the "terminable-interest" limitation of Section 812(e)(1)(B) that disagreement has arisen.

The courts agree, as they must, that the value of the award does not qualify for the deduction unless the widow's right to the full allowance is unconditionally vested. *Darby's Estate* v. *Wiseman*, 323 F. 2d 792, 795–796 (C.A. 10); *United States* v. *First National Bank & T. Co. of Augusta*, 297 F. 2d 312, 316–317 (C.A. 5). But the courts have split on the question as to when the terminable-interest rule is to be applied, some holding that the widow's right must be vested at the time of her husband's death (*Cunha's Estate* v. *Commissioner*, 279 F. 2d 292 (C.A. 9), certiorari denied, 364 U.S. 942, rehearing denied, 368 U.S. 870; *United States* v. *Quivey*, 292 F. 2d 252 (C.A. 8)), while the Fifth Circuit has held that it is sufficient if vesting occurs at the time of the probate court decree (*United States* v. *First National Bank & T. Co. of Augusta*, *supra*, pp. 316–317).*

*This disagreement also exists between the lower federal courts. Compare *United States Nat. Bank of Portland* v. *United States*, 188 F. Supp. 332 (D. Ore.); *Reynolds' Estate*

We shall first show that Congress plainly intended the terminable interest rule to be applied at the time the interest passes from the decedent, *i.e.*, at the date of death. We shall then show that even if the date of decree were adopted as the general rule, the allowance in this case would still be a terminable interest.

A. SECTION 812(e) MAKES THE DATE OF DEATH THE RELEVANT TIME FOR DETERMINING WHETHER A WIDOW'S ALLOWANCE IS A TERMINABLE INTEREST AND, AT THAT DATE, THE WIDOW'S INTEREST IN THIS CASE WAS TERMINABLE

A terminable interest, being an interest subject to a condition precedent or subsequent, can, of course, always become vested upon the occurrence of the event upon which it is contingent. Accordingly, it is necessary that the interest passing to the surviving spouse be characterized with reference to some specific point in time. The Senate Committee Report explaining the provision left no doubt what point of time was intended: in determining whether an interest is a nondeductible terminable interest, it said, "the situation is viewed as at the date of the decedent's death." S. Rep. No. 1013, 80th Cong., 2d Sess., Pt. 2, p. 10. See also the last paragraph of section 812(e)(3) of the 1939 Code, providing specifically that the person to whom an interest passes is to be determined "at the time of the decedent's death."

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v. *United States*, 189 F. Supp. 548 (E.D. Mich.), and *Estate of Rensenhouse* v. *Commissioner*, 31 T.C. 818, with *Second National Bank of New Haven* v. *United States*, 222 F. Supp. 446 (D. Conn.), *Estate of Landers* v. *Commissioner*, 38 T.C. 828, *Estate of Gale* v. *Commissioner*, 35 T.C. 215, and *Estate of Rudnick* v. *Commissioner*, 36 T.C. 1021.

'In the light of that history, the courts have uniformly agreed, in dealing with interests other than a widow's allowance, that the right to a marital deduction is to be determined at the instant of the decedent's death.' *Bookwalter* v. *Lamar*, 323 F. 2d 664 (C.A. 8); *United States* v. *Mappes*, 318 F. 2d 508 (C.A. 10); *Commissioner* v. *Ellis' Estate*, 252 F. 2d 109 (C.A. 3); *Starrett* v. *Commissioner*, 223 F. 2d. 163 (C.A. 1); *Estate of Sbicca* v. *Commissioner*, 35 T.C. 96; *Ballentine* v. *Tomlinson*, 293 F. 2d 311, 312 (C.A. 5). It is the Government's position that the same rule applies to a widow's allowance and that the existence at the time of the decedent's death of any substantial condition, either precedent or subsequent, to the surviving spouse's right to receive a support allowance makes the right to the allowance a terminable interest not qualifying for the marital deduction.

It is clear that when Congress repealed the specific deduction for widows' allowances as an administrative expense, it intended the deductibility of such awards thereafter to be governed, in the same manner as any other interest, by the marital deduction provisions including the exception for terminable interests. See

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'The sole exception to this rule is one sharply limited by the statute which creates it. Under Section 812(e)(1)(D), an interest is not to be considered terminable if it will fail *only* if the widow dies within six months of her husband's death (and she in fact survives that period). The condition of survival in the present case—to the date of the court decree and to the date of each payment—will cause the widow's allowance to fail even if death occurs after the six-month period. Moreover, the condition of remaining unremarried is not excepted from the general rule by Section 812(e)(1)(D).

S. Rep. No. 2375, 81st Cong., 2d Sess., p. 130, *supra*, p. 10; *Cunha's Estate* v. *Commissioner, supra; United States* v. *Quivey, supra;* Rev. Rul. 83, 1953–1 Cum. Bull. 395; Rev. Rul. 56-26, 1956–1 Cum. Bull. 447; Treasury Regulations on Estate Tax (1954 Code), Section 20.2056(b)–1(g), Example (8), and Section 20.2056(e)–2(a). There is no reason for applying the terminable-interest rule any differently to widows' allowance than to other interests passing to a surviving spouse. Indeed, the Senate twice declined. House-passed measures (see S. Rep. No. 1622, 83d Cong., 2d Sess., p. 125, and H.R. 2573, 86th Cong., 1st Sess.) which would have allowed, without qualification, a marital deduction for allowances paid to a widow within specified periods following the decedent's death.

If the terminable-interest limitation is to be applied to widows' allowances in the same manner as it is to other interests—*i.e.*, characterizing the interest as of the time of the decedent's death—whether an allowance is deductible or not will depend on its incidents under local law. Where state law grants an absolute vested right to the widow or to her estate at the instant of her husband's death, the allowance will qualify for the marital deduction. But, where local law conditions the award upon the widow's survival unremarried either until a decree is entered or throughout the period for which the allowance is made, there is interposed a substantial contingency beyond the widow's control, and the allowance is, therefore, a

nondeductible terminable interest. Cf. *Bookwalter* v. *Lamar, supra; United States* v. *Mappes, supra.*[8]

Those courts which have disregarded such substantial pre-decree contingencies, thus permitting a deduction where the allowance is contingent upon survival to the time of a judicial decree, may have been misled by the fact that a marital deduction is allowed for the value of property received under state law where the widow elects to take against the decedent's will.[9] See *United States* v. *First National Bank & T. Co. of Augusta, supra,* p. 317. Where, under state law, a widow obtains a fixed right to claim a non-terminable interest at her husband's death, the mere procedural requirement that the widow signify her election or file her claim—which she might do immediately—does not make the interest meaningfully contingent. Her election to take the interest is therefore deemed to relate back to the date of the decedent's death, and the marital deduction is permitted with respect to the property actually passing and vesting. *Dougherty* v. *United States,* 292 F. 2d 331 (C.A. 6); *United States* v. *Crosby,* 257 F. 2d 515 (C.A. 5); *United States* v. *Traders National Bank of Kansas*

[8] The acquiescence by the Internal Revenue Service (1962-1 Cum. Bull. 4) in *Estate of Gale* v. *Commissioner*, 35 T.C. 215, and *Estate of Rudnick* v. *Commissioner*, 36 T.C. 1021, was inconsistent with our present position, but action to substitute nonacquiescence has been withheld pending the outcome of this litigation.

[9] Treasury Regulations on Estate Tax (1954 Code), Section 20.2056(e)-2(a)(4).

City, 248 F. 2d 667 (C.A. 8).[10] Similarly, there is no objection to allowing the marital deduction for a widow's allowance in a state whose law gives the widow an absolute right to claim an allowance upon the decedent's death, with the allowance, once claimed, being thereafter payable to her or to her estate regardless of her survivorship. But there can be no marital deduction where the local law, in addition to requiring an election or filing of a claim, prescribes that the widow must survive until a particular point in time to receive the allowance. In that situation there is nothing which the widow can do, at the instant of her husband's death, which will guarantee receipt by her or by her estate of the interest so elected.

The application of those principles to the facts of this case is straightforward. A California widow's allowance is subject to the condition that the widow must survive and remain unmarried both until the date of the court decree and during the periods for which each successive monthly payment is made. *Estate of Blair*, 42 Cal. 2d 728, 269 P. 2d 612; *In re Lux's Estate*, 114 Cal. 73, 45 Pac. 1023; *Estate of Hamilton*, 66 Cal. 576, 6 Pac. 493. Those contingencies, prescribed by local law, make the allowance a

[10] But see *United States* v. *Hiles*, 318 F. 2d 56 (C.A. 5). Under the facts of that case the widow had no right under the Alabama statutes to receive cash in lieu of common-law dower. The local probate court, however, made a cash award to the widow pursuant to its alleged equitable powers, and the appellate court held that this cash award qualified for the marital deduction. We do not believe that the probate court award in *Hiles* comes within the purview of Section 20.2056(e)-2(a)(4) of the 1964 Code Regulations and, consequently, we believe the case was incorrectly decided.

terminable interest at the time of the spouse's death. It is therefore not deductible under Section 812(e).

B. EVEN IF THE COURT DECREE WERE TO BE RELATED BACK TO THE DATE OF DEATH, THE ALLOWANCE IN THIS CASE WOULD BE A TERMINABLE INTEREST

Even at the date of the court's decree in this case, the widow's right to receive the last ten monthly payments of $3000 remained subject to the contingency of her survival to the date of each payment. It is accordingly plain that this part of the award was not deductible regardless of whether the award is viewed at the date of death or at the date of decree. The petitioner contends, however, that because fourteen monthly payments had already accrued at the date of decree, the sum of $42,000 is deductible if the terminable interest rule is to be applied, as petitioner contends, at the date of decree. (Br. 7–15, 20–24). We submit that even if the interest were properly to be characterized by relating the probate decree back to the moment of the decedent's death, the $42,000 would still not be deductible.

A holding that the date of decree was controlling could only mean that conditions of survival and failure to remarry to the time of decree would not defeat the marital deduction—*i.e.*, that the decree, like a widow's election to take against a will, should be related back to the date of death. But even relation-back would not eliminate the other contingencies making the award in this case uncertain. Thus, for example, a condition that the widow must survive for eight months to receive an interest is a classic example of a terminable interest. See *supra*, p. 13,

n. 7. If the right to receive a widow's allowance is subject to the same condition, it cannot be made deductible simply by delaying the court decree until after eight months have passed. This is such a case, for the widow's right to an allowance of $42,000 was conditioned on her survival for fourteen months. This condition, which is far more than a mere requirement of survival to the date of decree, cannot be eliminated by the happenstance of the timing of the court award. Indeed it was recognized even in *United States* v. *First National Bank & T. Co. of Augusta*, 297 F. 2d 312, 316–317 (C.A. 5), that no deduction is permissible in a case of monthly payments where, as here, the widow must survive unremarried to the date of each payment. See also, *Darby's Estate* v. *Wiseman*, 323 F. 2d 792, 796 (C.A. 10).

II

THE WIDOW'S ALLOWANCE IN THIS CASE IS NOT DEDUCTIBLE BECAUSE ANOTHER INTEREST IN THE SAME PROPERTY HAS PASSED FROM THE DECEDENT TO ANOTHER PERSON WHO MAY ENJOY THE PROPERTY AFTER THE TERMINATION OR FAILURE OF THE ALLOWANCE

Under the terms of Section 812(e)(1)(B), an interest in property is not deductible if, upon the occurrence of an event, it will terminate and if another interest in the same property has passed to some other person, who may enjoy some part of the property after the termination of the widow's interest. In this case, the "property" in which the widow's allowance was an "interest" was either all of the underlying assets which formed the corpus of the decedent's

estate (*Cunha's Estate* v. *Commissioner, supra,* p. 298; *United States* v. *Quincy, supra,* p. 255; S. Rep. No. 1013, Part 2, 80th Cong., 2d Sess., p. 4) or, at the very least, so much of the corpus as was subject to the widow's claim—*i.e.*, the part that would be needed to pay the full allowance if the widow survived the twenty-four months without remarrying. Under either definition of the "property," the widow's allowance, consisting of a right to periodic payments, was an interest in the "property" which would terminate or fail upon the occurrence of an event (her death or marriage). It is equally plain that another interest in the same "property" passed to some other person (the decedent's daughter as residuary legatee) who would enjoy some part of the property upon the termination of the widow's interest. The allowance, therefore, constituted a nondeductible terminable interest within the meaning of Section 812(e)(1)(B). See *Meyer* v. *United States,* 364 U.S. 410.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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APPENDIX

California Probate Code, 53 West's Annotated California Codes:

SEC. 680. *Right to allowance; preference in payment; time of commencement*—The widow, widower, minor children, and adult children who have been declared incompetent by order of court are entitled to such reasonable allowance out of the estate as shall be necessary for their maintenance according to their circumstances, during the progress of the settlement of the estate, which, in case of an insolvent estate, must not continue longer than one year after granting letters. Such allowance must be paid in preference to all other charges, except funeral charges, expenses of the last illness and expenses of administration, and may, in the discretion of the court or judge granting it, take effect from the death of the decedent.

SEC. 681. *Time of grant; continuance; modification*—Such allowance may be granted before the inventory is filed, either by the court or a judge thereof; in which case it shall continue until modified by the court. After the inventory is filed the court may grant such allowance, or may modify any allowance made before the filing of the inventory, upon the petition of any person interested and a hearing after notice given for the period and in the manner required by section 1200 of this code.

SEC. 682. *Maintenance derived from other property; allowance to other members of family*—If the widow, widower, or any minor child has a reasonable maintenance derived from other property, and there are other persons entitled to a family allowance, the allowance shall

be granted only to those who have not such maintenance.

* * * * *

Internal Revenue Code of 1939 (26 U.S.C., 1952 ed.):

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * * *

(e) [as added by Sec. 361(a), Revenue Act of 1948, c. 168, 62 Stat. 110] *Bequests, Etc., to Surviving Spouse.*—

(1) *Allowance of marital deduction.*—

(A) *In General.*—An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(B) *Life Estate or Other Terminable Interest.*—Where, upon the lapse of time, upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur, such interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed with respect to such interest—

(i) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(ii) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;

* * * * *

(D) *Interest of Spouse Conditional on Survival for Limited Period.*—For the purposes of

subparagraph (B) an interest passing to the surviving spouse shall not be considered as an interest which will terminate or fail upon the death of such spouse if—

(i) such death will cause a termination or failure of such interest only if it occurs within a period not exceeding six months after the decedent's death, or only if it occurs as a result of a common disaster resulting in the death of the decedent and the surviving spouse, or only if it occurs in the case of either such event; and

(ii) such termination or failure does not in fact occur.

* * * * * * *

(H) *Limitation on Aggregate of Deductions.*—The aggregate amount of the deductions allowed under this paragraph (computed without regard to this subparagraph) shall not exceed 50 per centum of the value of the adjusted gross estate, as defined in paragraph (2).

* * * * * * *

Treasury Regulations 105 (1939 Code):

SEC. 81.47b [as added by T.D. 5699, 1949 Cum. Bull. 181, 202, and amended by T.D. 6082, 1954–2 Cum. Bull. 295, 297]. *Nondeductible interests.*—

* * * * * * *

(*d*) *Interest in property which another person may possess or enjoy.* Section 812(e)(1)(B) provides that no marital deduction shall be allowed with respect to certain property interests (referred to generally as "terminable interests") which passed from the decedent to his surviving spouse, in case—

(1) An interest in the same property passed at any time (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such spouse (or the estate of such spouse), and

(2) By reason thereof, such person (or his heirs or assigns) may possess or enjoy any part of such property after the termination or failure of the interest therein which passed from the decedent to his surviving spouse.

The foregoing provision is applicable only where interests in the same property passed from the decedent both to his surviving spouse, and to some other person (for less than an adequate and full consideration in money or money's worth), and is applicable irrespective of whether both such interests passed from the decedent at the same time or under the same instrument. Under such circumstances, if the other person to whom an interest passed may, by reason thereof, possess or enjoy any part of the property after the termination or failure of the interest therein which passed from the decedent to his surviving spouse, the latter interest is a "nondeductible interest." As to the meaning of the term "passed from the decedent to a person other than his surviving spouse," see paragraph (b) of section 81.47a.

In determining whether an interest in the same property passed from the decedent both to his surviving spouse and to some other person, a distinction is to be drawn between "property," as such term is used in section 812(e), and an "interest in property." The term "property" refers to the underlying property in which various interests exist; each such interest is not for this purpose to be considered as "property."

Interests which passed to a person other than the surviving spouse include interests so passing under the decedent's exercise, release, or nonexercise of a nontaxable power to appoint. It is immaterial whether the property interest which passed from the decedent to a person other than his surviving spouse is included in the decedent's gross estate.

* * * Whether there is a possibility that the "person other than his surviving spouse" (or the heirs or assigns of such person) may possess or enjoy the property following termination or failure of the interest therein which passed from the decedent to his surviving spouse is to be determined as of the time of the decedent's death.

* * * * *

Treasury Regulations on Estate Taxes (1954 Code):

SEC. 20.2056(b)-1 *Marital deduction; limitation in case of life estate or other "terminable interest"*—(a) *In general.* Section 2056(b) provides that no marital deduction is allowed with respect to certain property interests, referred to generally as "terminable interests," passing from a decedent to his surviving spouse. The phrase "terminable interest" is defined in paragraph (b) of this section. * * *

(b) *"Terminable interests."* A "terminable interest" in property is an interest which will terminate or fail on the lapse of time or on the occurrence or the failure to occur of some contingency. Life estates, terms for years, annuities, patents, and copyrights are therefore terminable interests. However, a bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity or a term for years, is not a terminable interest.

(c) *Nondeductible terminable interests.* (1) A property interest which constitutes a terminable interest, as defined in paragraph (b) of this section is nondeductible if—

(i) Another interest in the same property passed from the decedent to some other person for less than an adequate and full consideration in money or money's worth, and

(ii) By reason of its passing, the other person or his heirs or assigns may possess or enjoy any part of the property after the

termination or failure of the spouse's interest.

* * * * *

(e) *Miscellaneous principles.* (1) In determining whether an interest passed from the decedent to some other person, it is immaterial whether interests in the same property passed to the decedent's spouse and another person at the same time, or under the same instrument.

(2) In determining whether an interest in the same property passed from the decedent both to his surviving spouse and to some other person, a distinction is to be drawn between "property," as such term is used in section 2056, and an "interest in property." The term "property" refers to the underlying property in which various interests exist; each such interest is not for this purpose to be considered as "property."

* * * * *

(g) *Examples.* The application of this section may be illustrated by the following examples, in each of which it is assumed that the property interest which passed from the decedent to a person other than his surviving spouse did not pass for an adequate and full consideration in money or money's worth:

* * * * *

Example (8). Assume that pursuant to local law an allowance for support is payable to the decedent's surviving spouse during the period of the administration of the decedent's estate, but that upon her death or remarriage during such period her right to any further allowance will terminate. Assume further that the surviving spouse is sole beneficiary of the decedent's estate. Under such circumstances, the allowance constitutes a deductible interest since any part of the allowance not receivable by the surviving spouse during her lifetime will pass to her estate under the terms of the decedent's will. If, in this example, the decedent be-

queathed only one-third of his residuary estate to his surviving spouse, then two-thirds of the allowance for support would constitute a nondeductible terminable interest.

(26 C.F.R., Sec. 20.2056(b)–1.)

SEC. 20.2056(e)–2 *Marital deduction; definition of "passed from the decedent to his surviving sponse"*—(a) *In general.* * * * An allowance or award paid to a surviving spouse pursuant to a local law for her support during the administration of the decedent's estate constitutes a property interest passing from the decedent to his surviving spouse. In determining whether or not such an interest is deductible, however, see generally the terminable interest rules of § 20.2056(b)–1 and especially example (8) of paragraph (g) of that section.

* * * * *

(26 C.F.R., Sec. 20.2056(e)–2.)

SEC. 20.2056(e)–2 *Marital deduction; definition of "passed from the decedent to a person other than his surviving spouse".* The expression "passed from the decedent to a person other than his surviving spouse" refers to any property interest which, under the definition stated in § 20.2056(e)–1 is considered as having "passed from the decedent" and which under the rules referred to in § 20.2056(e)–2 is not considered as having "passed from the decedent to his surviving spouse." * * * Whether or not there is a possibility that the "person other than his surviving spouse" (or the heirs or assigns of such person) may possess or enjoy the property following termination or failure of the interest therein which passed from the decedent to his surviving spouse is to be determined as of the time of the decedent's death.

(26 C.F.R., Sec. 20.2056(e)–3.)

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